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### Florida Dower – Does It Qualify for the Marital Deduction?

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# FLORIDA DOWER—DOES IT QUALIFY FOR THE MARITAL DEDUCTION?\*

ALLEN D. ALTMAN\*\*

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## I. INTRODUCTION

Surprisingly, very little has been written on the Florida widow's statutory right to elect dower.<sup>1</sup> Perhaps because the Florida dower interest *patently* qualifies for the federal estate tax marital deduction, nothing heretofore has been written on whether it *technically* qualifies. To real property and probate lawyers the qualification of the dower right for the marital deduction is an extremely important factor to consider when counselling the widow: Is it to her advantage to elect dower in lieu of what she would receive under her husband's will in the case of testacy or under the law of descent and distribution in the case of intestacy?

The significance of this question becomes readily apparent when presented with the following illustration. At the death of Mr. Rich, a long-time Florida resident, wealthy farmer, and real estate investor, both his probate estate and his taxable estate for federal estate tax purposes approximates \$2,000,000. By will he left his wife cash and securities worth \$50,000 and Florida real estate valued at \$450,000. Soon after the death of her husband, Mrs. Rich learns that it may be to her advantage to relinquish the \$500,000 interest under her husband's will and instead elect to take a statutory dower interest which, in her case, would amount to \$666,667. The choice appears to be a simple one—\$500,000 by will or \$666,667 by electing dower. The possibility of an additional \$166,667 receivable under the dower election is tempting only so long as the marital deduction is not lost. The \$500,000 under the will qualifies for the marital deduction and passes tax-free but the dower interest, if taxable, would be worth only \$415,600<sup>2</sup> (some \$84,400 less than if she had not elected to take dower at

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1. FLA. STAT. §§ 731.34-.35 (1965).  
2. FLA. STAT. § 731.34 (1965):

all!). In economic terms, whether or not the Florida dower interest qualifies for the marital deduction is a most important question to resolve.

It is the purpose of this paper to present an analysis of the Florida and federal law pertaining to dower and the marital deduction. The schematic presentation shall include a review of the Florida dower statute, some introductory definitions of key marital deduction terms, and an explanation of the effect that the date of death application of the terminable interest rule has had upon the marital deduction, and the impact it has had upon dower in Florida.

## II. BRIEF SUMMARY OF FLORIDA DOWER

In general, the Florida dower statute<sup>3</sup> provides that in lieu of what the widow would have received under her husband's will or under the law of descent and distribution,<sup>4</sup> she shall have the right to elect a fee interest in both the real and personal property owned by her husband at the time of his death.<sup>5</sup> The dower interest must be affirmatively elected in a writing which must be filed within nine months after the first publication of the notice to creditors or within seventy days from the date of final judgment determining the last outstanding claim affecting the estate whichever comes later.<sup>6</sup> Since 1965, the absolute right to elect dower has been personal to the widow, that is, it is exercisable solely by her and is extinguished upon her death in the event that she has not elected prior thereto,<sup>7</sup> except that, in the event that the widow is under a disability, her guardian may elect to take dower on her behalf subject to the approval of the county judge.<sup>8</sup> The guardian only has the authority to initiate a petition requesting dower, but he does not have an unconditional right to elect for her.<sup>9</sup> The actual election can only be made by the county judge.<sup>10</sup>

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In any case where the dower interest of the widow shall have the effect of increasing the estate tax, her dower shall be ratably liable with the remainder of the estate for the estate taxes due by the estate of her deceased husband . . . .

On a \$2,000,000 taxable estate the amount owing is \$753,200; one-third of which (\$251,067), is attributable to the widow's dower interest.

3. FLA. STAT. §§ 731.34-35 (1965).

4. FLA. STAT. § 731.10 (1965).

5. FLA. STAT. § 731.34 (1965).

6. FLA. STAT. § 731.35(1)-(2) (1965).

7. Prior to 1965 anyone who had a beneficial interest in the estate of the deceased widow could elect, with the approval of the county judge, to take dower on her behalf if she died within the time allowed for the filing of the election without having done so. FLA. STAT. § 731.35(3) (1963).

8. FLA. STAT. § 731.35(3) (1965).

9. *Edwards v. Edwards*, 106 So.2d 558 (Fla. 1958); *First Nat'l Bank v. McDonald*, 100 Fla. 675, 130 So. 596 (1930) *In re Estate of Pearson*, 192 So.2d 89 (Fla. 2d Dist. 1966).

10. See cases cited note 9 *supra*; FLA. STAT. § 731.35(3) (1965) requires the judge to base his grant or denial of the petition upon a consideration of the best interests of the widow.

## III. INTRODUCTORY TAX DEFINITIONS

Section 2056 of the Internal Revenue Code of 1954<sup>11</sup> contains the rules and limitations by which a maximum of fifty percent of the value of a decedent's estate (after the deduction of section 2053 administration expenses and section 2054 uninsured casualty and theft losses incurred during the administration of the estate) may pass without tax to the surviving spouse.<sup>12</sup> The initial Code limitation upon the allowance of the deduction is that an interest in property must "pass" from the decedent to his widow.<sup>13</sup> For purposes of this requirement, a dower interest is defined by Code section 2056(e)(3) as an interest in property passing from the decedent to his widow. It is important to note that this definition does not mean that all dower interests automatically qualify for the marital deduction. On the contrary, this subsection is strictly limited to the "passing" requirement. It has no application to the limitation in section 2056(b) commonly known as the terminable interest rule. This latter restriction disallows the deduction of life estates and other annuity-like interests

where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, the interest passing to the surviving spouse will terminate or fail.<sup>14</sup>

An interest which falls within this classification is aptly known as a terminable interest,<sup>15</sup> which, solely for the purpose of this paper, shall be considered the only nondeductible interest.<sup>16</sup>

Two terms between which a little understood, but critical distinction must be made are "property" and "interest in property" (hereinafter generally referred to as an "interest"). In the past the distinction has not often been recognized, so that misconceptions among judges and practitioners have been prevalent. Treasury Regulation section 20.2056(b)-1(e)(2) recognizes the distinction and refers to "property" as "the underlying property in which various interests exist." In other words, the

11. Formerly INT. REV. CODE OF 1939, § 812(e).

12. INT. REV. CODE OF 1954, § 2056(c). For the purposes of this paper the surviving spouse shall be referred to in the feminine gender.

13. INT. REV. CODE OF 1954, § 2056(a).

14. INT. REV. CODE OF 1954, § 2056(b)(1). For the purposes of this paper only the general rule quoted in the text shall be under consideration.

15. Treas. Reg. § 20.2056(b)-1(b) (1958).

16. It should be noted that in actuality not all terminable interests are nondeductible. However, herein, it shall be assumed that, unless stated otherwise, all terminable interests are nondeductible. As stated in Treas. Reg. § 20.2056(b)-1(c)(1) (1958), a property interest which constitutes a terminable interest is nondeductible only if:

(i) Another interest in the same property passed from the decedent to some other person for less than an adequate and full consideration in money or money's worth, and

(ii) By reason of its passing, the other person or his heirs or assigns may possess or enjoy any part of the property after the termination or failure of the spouse's interest.

term means the assets of the decedent's estate. The Senate Finance Committee which reported on the marital deduction prior to its enactment in 1948<sup>17</sup> defined an "interest" as "the quality and quantum of ownership by the surviving spouse or other person, in particular property."<sup>18</sup> Simply put, an "interest" is the right to receive particular property in the decedent's estate. Both the underlying property and the interest or rights to receive it must circumvent the provisions of the terminable interest rule for a marital deduction to be allowed.<sup>19</sup>

#### IV. THE UNITED STATES SUPREME COURT ENUNCIATES TERMINABILITY

In 1964 in *Jackson v. United States*,<sup>20</sup> the United States Supreme Court held that the California widow's allowance was a terminable interest which did not qualify for the marital deduction because the widow did not have an indefeasible interest in the allowance at the moment of her husband's death.<sup>21</sup> Basically, the Court laid down the rule that for all interests which are sought to be allowed under the marital deduction, terminability must be determined as of the moment of the decedent's death.<sup>22</sup>

The case resolved a conflict in the lower courts on whether the order of a probate court granting a widow's allowance could be related back for federal estate tax purposes so that it could be said that it was indefeasibly vested at the date of the husband's death.<sup>23</sup> But this was said to be a mis-

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17. The marital deduction was enacted by Congress in 1948 to equate the estate tax effect in common law and community property law states. The desired end was that in the former states one-half of the estate of the first decedent should be able to pass without tax to the surviving spouse such as is essentially the case in the latter states where each spouse owns one-half of the community or marital property. See Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097; Anderson, *The Marital Deduction and Equalization under the Federal Estate and Gift Taxes Between Common Law and Community Property States*, 54 MICH. L. REV. 1087.

18. S. REP. NO. 1013, Part 2, 80th Cong., 2d Sess. 4 (1948).

19. INT. REV. CODE OF 1954, § 2056(b)(1).

20. 376 U.S. 503 (1964).

21. On appeal the taxpayer argued that \$42,000 of the \$72,000 paid to the widow should qualify for the marital deduction because as to this amount there was nothing terminable about it from the date of the probate court decree some fourteen months after the husband's death. The decree ordered the payment to her of \$3,000 a week starting with the date the husband died. Under California law the right terminates if the widow remarries or dies prior to securing an order for a widow's allowance. Amounts accrued but unpaid at the time the widow remarries or dies are payable to her or her estate, but the right to future payments abates at the moment of the change in her status.

22. *Id.* at 508, citing *Bookwalter v. Lamar*, 323 F.2d 664 (8th Cir. 1963); *United States v. Mappes*, 318 F.2d 508 (10th Cir. 1963); *Commissioner v. Estate of Ellis*, 252 F.2d 109 (3d Cir. 1958); *Starrett v. Commissioner*, 223 F.2d 163 (1st Cir. 1955); *Estate of Frank Sbicca*, 35 T.C. 96 (1960). The Court noted that the six months survival provision in Code section 2056(b)(3) is an exception to this rule.

23. The relation back or date of decree approach was applied in *United States v. First Nat'l Bank & Trust Co.*, 297 F.2d 312 (5th Cir. 1961); *Estate of Michael G. Rudnick*, 36 T.C. 1021 (1961); *Estate of Margaret R. Gale*, 35 T.C. 215 (1960). The date of death approach was applied in *Bookwalter v. Lamar*, 323 F.2d 664 (8th Cir. 1963); *United States v. Mappes*, 318 F.2d 508 (10th Cir. 1963); *United States v. Quivey*, 292 F.2d 252 (8th Cir. 1961); *Estate of Cunha v. Commissioner*, 279 F.2d 292 (9th Cir. 1960); *Commissioner v.*

application of the terminability rule.<sup>24</sup> Principally, this approach disregarded the interest-property dichotomy and simply made the determination rest upon whether the *property* passing to the widow was indefeasibly vested in her at the time of the award.<sup>25</sup>

In *Jackson* the Supreme Court determined that the date of death was the time Congress<sup>26</sup> had intended for terminability to be tested. In adopting this time approach, the Court mandated that under section 2056(b) a determination must be made whether the interest or right to receive particular property of the estate was by its nature terminable.<sup>27</sup> Therefore, for federal estate tax purposes a retroactive court order does not change the defeasible nature of the interest.<sup>28</sup> Under the test set out by the court, an "interest in property" qualifies for the marital deduction only if it is *vested indefeasibly, unconditionally, and noncontingently*<sup>29</sup> at the time of the death of the decedent. Therefore, in the event of the death of the surviving spouse as of any moment of time following the decedent's death, the *interest* must remain as an asset of the survivor's estate.<sup>30</sup>

In applying the terminable interest rule to the interest passing to the widow at the moment of her husband's death, it must be noted that the terms "vested" and "indefeasible" cannot be equated *carte blanche*.<sup>31</sup> Standing alone, the former is a state property law concept<sup>32</sup> which may or may not be synonymous with the federal estate tax law concept of a right which is absolutely exercisable by the surviving spouse or the heirs of her estate.<sup>33</sup> In this regard the Senate Finance Committee commented that the interest is terminable regardless of whether under state law it "is considered as a vested interest subject to divestment or is a contingent interest."<sup>34</sup> The Supreme Court in *Jackson*, however, stated that local law will determine whether such interest may lapse because of time or the

Estate of Ellis, 252 F.2d 109 (3d Cir. 1958); *Starrett v. Commissioner*, 223 F.2d 163 (1st Cir. 1955); *Estate of Frank Sbicca*, 35 T.C. 96 (1960).

24. *Jackson v. United States*, 376 U.S. 503, 508 (1964).

25. The Court rejected the idea that the later the award of the widow's allowance the greater the amount that would be indefeasibly vested and therefore deductible under the date of decree approach. *Id.* at 507-508.

26. S. REP. NO. 1013, Part 2, 80th Cong., 2d Sess. 10 (1948) cited in *Jackson v. United States*, 376 U.S. at 508.

27. 376 U.S. at 508.

28. *Id.* at 507.

29. *Id.* at 508. The Senate Report indicates the overlapping of conditions and contingencies by declaring that "[t]he occurrence of a contingency includes the ending of a condition." S. REP. NO. 1013, Part 2, 80th Cong., 2d Sess. at 7 (1948).

30. Rev. Rul. 83, 1953-1 CUM. BULL. 395 was the first official interpretation to denote the requirement of inheritability of interests at the date of the decedent's death.

31. The term "vested" may be used to describe the nature of retroactive rights under state law, while the term "indefeasible" is descriptive of the nature of rights under state law existing at the very moment of the decedent's death.

32. State property law often refers to "vested" interests as a short form of interests that are "vested" subject to divestment.

33. Rev. Rul. 83, note 30 *supra*.

34. S. REP. NO. 1013, Part 2, 80th Cong., 2d Sess. 7 (1948).

occurrence or non-occurrence of an event or contingency.<sup>35</sup> Therefore, by a joint state-federal law application, the nature and characteristics of interests arising under state law are to be determined by recourse to the law of such state, while their classification for the application of the terminable interest rule are to be determined by federal law.

The strict language in *Jackson*,<sup>36</sup> where the Court cited the examples in the legislative history,<sup>37</sup> makes it clear that the terminability test is to be all-encompassing. Therefore, at the date of death, the mere possibility that a contingency or event may occur or fail will make the interest non-deductible. As expressed by the Sixth Circuit, "[t]he critical factor in applying the terminable interest rule is the possibility under state law of the failure of an interest rather than the actual failure."<sup>38</sup> Thus, it is clear that it is not the actual failure but the theoretical possibility of failure upon which the interest will be tested.<sup>39</sup>

*Kendall v. United States*<sup>40</sup> well illustrated the theoretical failure of any personal right passing to the surviving spouse which is lost upon a change in the personal status for which the interest depends.<sup>41</sup> In this case the district court limited the husband's interest that qualified for the marital deduction to his indefeasibly vested one-third interest in his wife's personal estate, even though the probate court had directed the executor to pay the husband two-thirds of the personal estate. After noting that under Vermont law the husband's right to receive the additional interest was extinguishable at his death, the district court stated that "[s]ince anything assigned to the surviving spouse over one-third [was] personal to the surviving spouse, it would be a terminable interest, and thus would not qualify for the marital deduction. *Jackson v. United States*."<sup>42</sup> It should be noted that in this case the interest in excess of the minimum statutory amount was likewise made terminable because of the discretion of the probate court to award the additional interest. The discretion subjected the interest to a proscribed contingency<sup>43</sup> which caused it to fall into the terminable interest classification.

In the past the theoretical failure questions has also arisen in the

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35. 376 U.S. at 506. See also *Estate of Cunha v. Commissioner*, 279 F.2d 292 (9th Cir. 1960).

36. 376 U.S. at 510.

37. Citing the examples in S. REP. No. 1013, Part 2 at 10, 11, 15, see quote in text accompanying note 64 *infra*. The terminable interest provision "is intended to be all encompassing with respect to various kinds of contingencies and conditions." *Id.* at 7.

38. *Hamilton Nat'l Bank v. United States*, 353 F.2d 930, 931 (6th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966).

40. 1966-1 U.S. Tax Cas. 86,312, 17 Am. Fed. Tax R. 2d 1413 (D. Vt. 1966).

41. See *Jackson v. United States*, 376 U.S. 503, 506-507, (1964), where the Court presages that all personal interests are terminable because of their defeasible or conditional nature.

42. *Kendall v. United States*, note 40 *supra*, 1966-1 U.S. Tax Cas. at 86,313, 17 Am. Fed. Tax R. 2d at 1414.

43. INT. REV. CODE OF 1954, § 2056(b)(1).

context of whether an interest is terminable if under state law the surviving spouse is required to make a timely and appropriate election. It has been uniformly held that the invocation of formal legal procedures as a prerequisite to the enforcement of state created rights does not make the interest terminable;<sup>44</sup> otherwise, all elective statutory rights would be precluded from qualifying for the marital deduction. Certainly, this was not the intent of Congress when it provided in the Code<sup>45</sup> that dower and statutory interests in lieu thereof satisfy the passing requirement. Ostensibly, a time limit on the right to elect a dower interest will be treated as a mere formal limitation outside the scope of the terminable interest rule.<sup>46</sup>

Before turning to Florida law, one further point on federal law demands comment. It has been suggested by one estate planner<sup>47</sup> that an end run around the terminable interest rule can be made by including in the husband's will alternative bequests in the following form: under Part I, the widow shall receive the husband's entire estate if at his death she will execute an agreement to devise her whole estate, including any assets received under the husband's will, to their children (in essence a nondeuctible life estate in the widow); alternatively, under Part II, the widow shall receive the dower interest provided by statute if she fails to execute the agreement.<sup>48</sup> The purpose of these provisions is to qualify the terminable life estate up to the extent of the smaller nonterminable interest that the widow would have received had she chose to take under the will. Example 8 of Treasury Regulations section 20.2056(b)-1(g) is the authority that allegedly supports this device. It provides that to the extent that the widow is the residuary beneficiary of her husband's estate, that proportionate amount of a terminable widow's allowance will constitute a deductible interest since that part of the allowance not received by the widow during her lifetime will pass to her estate.<sup>49</sup>

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44. *Hamilton Nat'l Bank v. United States*, 353 F.2d 930, 931 (6th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966). *First Nat'l Exchange Bank v. United States*, 335 F.2d 91 (4th Cir. 1964); *United States v. Hiles*, 318 F.2d 56 (5th Cir. 1963); *Dougherty v. United States*, 292 F.2d 331 (6th Cir. 1961); *United States v. Crosby*, 257 F.2d 515 (5th Cir. 1958), *Wachovia Bank & Trust Co. v. United States*, 234 F. Supp. 897 (M.D.N.C. 1964).

45. INT. REV. CODE OF 1954, § 2056(e)(3).

46. Treas. Reg. § 20.2056(b)-5(g)(4) (1958) recognizes that limitations of a formal nature will not disqualify an interest such as where the exercise of a power of appointment in the surviving spouse is conditioned upon reasonable notice or that such exercise must be in a particular form.

47. Paper presented by Richard B. Covey, Recent Developments Concerning Gift and Estate Taxation—1966, First Annual Estate Planning Institute, Univ. of Miami at ¶ 67.109, 1-39, January 11, 1967.

48. It would appear that Part II would be of no effect under state law because by its nature the widow's statutory dower right cannot be altered or abridged by such unilateral action. Since the provision ostensibly would not provide the widow with any interest that she will not be entitled to under state law there is little basis upon which to give it significance for federal estate tax purposes. Nevertheless, since this arguemnt was not raised in *Allen v. United States*, 359 F.2d 151 (2d Cir. 1966), wherein a like alternative bequest provision was in issue, it shall be assumed *arguendo* that Part II would have significance for federal estate tax purposes.

49. This theory has one main flaw—namely that Example 8 is applicable only to those



For all of its appeal, this device would appear to have overlooked that part of the passing requirement<sup>50</sup> which precludes a substitution of interests passing to the widow such that if the particular interest passing to her were to fail to circumnavigate the terminable interest rule the alternative interest relinquished could "pass" in its stead. Treasury Regulation section 20.2056(e)-2(c) well illustrates the effect of an election upon the determination of which interest passes:

If the surviving spouse elects to take under the will or other instrument, then the dower or other property interests relinquished by her is not considered as having "passed from the decedent to his surviving spouse" . . . and *the interest taken* under the will or other instrument is considered as having so passed.<sup>51</sup>

In *Allen v. United States*<sup>52</sup> the Second Circuit refused to look at this alternative bequest device as a whole, reasoning that Part I must be examined separately from Part II.

The theory upon which the alternate bequest device is premised is also in conflict with the *ratio decidendi* of the commuted dower cases.<sup>53</sup> These cases have arisen where state law provides that in lieu of taking under her husband's will the widow may choose between a dower interest consisting of a fee in one-third of the husband's personalty and a life estate in one-third of his realty, or a like dower interest in personalty but as to his realty an outright cash interest measured by the commuted or actuarial value of her life estate. It has been uniformly held that where the widow elects to take commuted dower, the whole interest qualifies for the marital deduction, whereas if she were to elect dower proper the life estate portion of her interest would not qualify.<sup>54</sup> Thus, if by statute the widow is given alternative dower rights it is the interest that she elects that is deemed to have passed.<sup>55</sup>

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situations where payment of a widow's allowance acts as an advancement on the underlying qualifying interest. This application of Example 8 is noted in Treas. Reg. § 20.2056(e)-2(a) (1958) (last two sentences).

50. INT. REV. CODE OF 1954, § 2056(a).

51. (Emphasis added). The second sentence of this regulation subsection similarly treats the converse situation where the surviving spouse elects to take a statutory interest in lieu of taking under the will. In this case the dower interest is considered as having passed.

52. 359 F.2d 151 (2d Cir. 1966). The decision was criticized by Richard B. Covey, note 47 *supra*, a proponent of the alternate bequest device.

53. *Hamilton Nat'l Bank v. United States*, 353 F.2d 930, 931 (6th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *First Nat'l Exchange Bank v. United States*, 335 F.2d 91 (4th Cir. 1964); *United States v. Hiles*, 318 F.2d 56 (5th Cir. 1963); *Dougherty v. United States*, 292 F.2d 331 (6th Cir. 1961); *United States v. Crosby*, 257 F.2d 515 (5th Cir. 1958); *Wachovia Bank & Trust Co. v. United States*, 234 F. Supp. 897 (M.D.N.C. 1964); *National Bank v. United States*, 218 F. Supp. 907 (E.D. Va. 1963); *Moore v. United States*, 214 F. Supp. 603 (W.D. Ky. 1963).

54. *See* cases cited note 53 *supra*.

55. Until now, the government has not raised the defeasibility issue in those cases where under state law the right to elect commuted dower is personal to the widow and terminates at her death. Nor has it as yet argued that where the right to elect the com-

## V. APPLICATION OF FEDERAL TAX LAW TO FLORIDA DOWER

The essential nature and characteristic of Florida dower having been set forth previously, we shall now proceed to determine whether the nature of the interest brings it within the proscription of the terminable interest rule. Since the whole dower interest passing to the widow is in fee, the *property* both real and personal, may qualify for the marital deduction.<sup>56</sup>

Thus, under Florida law, the only possible statutory bar to the deduction is the terminability of the *interest* or right to elect dower. Two statutory limitations on the interest are that the election must be affirmatively made in writing and filed within a limited time. These requirements do not act as proscribed conditions upon the interest because they are mere formal limitations upon the right<sup>57</sup> which fall outside the scope of the terminable interest rule.

A third statutory limitation on the interest is that during the period in which to elect dower the right can only be exercised by the widow. By definition, this personal nature of the right causes it to lapse at the widow's death.<sup>58</sup> As such it carries the terminable interest taint of defeasibility<sup>59</sup> since at the time of the husband's death (the moment at which the terminable interest test is applied) a theoretical possibility<sup>60</sup> exists that the right would be terminated by the death of the widow prior to her having elected.

A fourth statutory limitation on the interest is that if the widow is incompetent at the time of her husband's death, or becomes incompetent during the period of election, the dower right is subject to the discretionary award of the county judge. The interest of the incompetent widow is therefore terminable because it is subject to a proscribed condition.<sup>61</sup> As with a competent widow, the death of an incompetent widow extinguishes an unexercised right of election, even when the guardian has already filed a petition for dower and only the official award is lacking.<sup>62</sup>

In summary, the Florida dower interest is terminable twice over be-

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muned dower interest is conditional upon the approval of the probate court the interest is terminable.

56. Assuming that Code section 2056(b)(1)(A) and (B), as well as the other limitations in this section, do not control.

57. See text accompanying notes 44 and 46 *supra*.

58. *Bibb v. Bickford*, 149 So.2d 592 (Fla. 1st Dist. 1963).

59. *Kendall v. United States*, 1966-1 U.S. Tax Cas. 86,312, 17 Am. Fed. Tax R.2d 1413 (D. Vt. 1966); *United States v. Edmondson*, 331 F.2d 676 (5th Cir. 1964). See *Jackson v. United States*, 376 U.S. 503, 506-507.

60. See text accompanying notes 36-39 *supra*.

61. INT. REV. CODE OF 1954, § 2056(b)(1). The possibility that the widow may become incompetent during the time to elect, and thereby lose her absolute right of election, has the effect of subjecting her interest to a terminable condition.

62. *In re Estate of Pearson*, 192 So.2d 89 (Fla. 2d Dist. 1966).

cause at the crucial time of the husband's death the right to elect is both defeasible and conditional.

It is no answer for the die-hard to say that Congress could not one moment have declared that a dower interest may qualify for the marital deduction and then the next moment have in fact taken it away by making nondeductible the personal dower interests afforded by nearly all states.<sup>63</sup> Nor is it an answer to say that in enacting the terminable interest provisions, Congress sought only to assure that interests deducted from the first decedent's estate would not also escape taxation in the estate of the surviving spouse. As declared by the Supreme Court of the United States:

[T]he determinative factor is not taxability to the surviving spouse but terminability as defined by the statute . . . . [T]he device of the marital deduction which Congress chose to achieve uniformity was knowingly hedged with limitations, including the terminable-interest rule. These provisions may be imperfect devices to achieve the desired end, but they are the means which Congress chose. To the extent it was thought desirable to modify the rigors of the terminable-interest rule, exceptions to the rule were written into the Code. Courts should hesitate to provide still another exception by straying so far from the statutory language . . . .<sup>64</sup>

## VI. EFFECTS ON POST-MORTEM PLANNING

From the standpoint of the Florida widow, the disqualification of her terminable dower interest may greatly burden her with an appreciable estate tax liability since, by statute,<sup>65</sup> the taxable interest which she elects is ratably liable with the remainder of the estate for the taxes due by the estate of her deceased husband. As a result of this tax liability the widow may be faced with a severe liquidity problem if the nature of the property that she receives via her dower election is not both readily and practicably saleable. Forced sales may cause the widow to suffer heavy financial losses in an attempt to raise the cash necessary for the estate taxes due from her interest. Thus, no longer will a larger pre-tax terminable dower interest invariably appear more attractive than a smaller tax-free testamentary bequest.

From the standpoint of the estate, the election of the taxable dower interest will require the executor to seek contribution from the widow for the estate tax owing on her interest. The work of an executor may be eased by the unattractiveness of a taxable dower interest since the widow's

63. The legislative history expressly declares that if the dower interest of the surviving spouse is a terminable interest the marital deduction cannot be allowed. S. REP. NO. 1013, Part 2, 80th Cong., 2d Sess. 9 (1948).

64. *Jackson v. United States*, 376 U.S. 503, 510 (1964) (footnotes omitted) (emphasis added).

65. FLA. STAT. § 731.34 (1965).

failure to exercise her right will prevent the estate from being overturned by an unexpected election.

## VII. PROPOSED AMENDMENT OF FLORIDA STATUTE

### *Section 731.35(3)*

Unmistakably, the controlling factor bearing on an amendment of the Florida dower statute should be the desire to statutorily secure for the widow the maximum potential benefits that the interest will afford. This goal can be achieved only with a dower interest capable of qualifying for the marital deduction. To qualify the Florida dower interest, two changes must be made. First, to rectify its present defeasible nature, the right of election must be made inheritable and unqualifiedly exercisable by the personal representative. Second, the conditional right of the guardian of an incompetent widow to elect dower on her behalf must be made absolute. A failure to make *both* of these changes will only perpetuate the inimical terminable character of the interest.

Of the two recommendations, the latter would appear to be the less objectionable innovation because just as the county judge is commanded to act on behalf of the incompetent widow's best interests,<sup>66</sup> so too is the guardian, as a fiduciary, commanded to serve her best interests. The same result can be accomplished by omitting the purposeless super-fiduciary judicial election and in its stead bestowing an absolute right of election in the guardian. If ever the county judge entertains a notion of infidelity by the guardian, he may use the remedies normally applied in any fiduciary situation—increase the fiduciary's bond, appoint a co-fiduciary, or remove him.

It is to be expected that those who favor dower as a right personal to the widow will find the first proposal most objectionable. These personal right proponents can strongly argue that the suggested statutory modification subverts the limited purpose of the statute, namely to insure ample provision for the widow's personal needs and comfort.<sup>67</sup> They may think of the proposal as an undermining of the spirit of the statute because it will permit a timely right of election, unexercised at the widow's death, to possibly pass to her creditors and distant relatives. Judge Dowling, in his article *Dower in Florida*,<sup>68</sup> suggests that it would be inequitable for the dower right to be thrown open to the widow's creditors and collateral kin, in preference to the close relatives of her deceased husband and his lawful creditors.<sup>69</sup>

However uncompromising as this argument may appear, sight must

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66. See note 10 *supra*.

67. *In re Estate of Pearson*, 192 So.2d 89 (Fla. 2d Dist. 1966).

68. 31 FLA. B.J. 345 (1957).

69. *Id.* at 348.

not be lost of the fact that the first and foremost concern should be with what the widow actually receives in the settlement of her husband's estate.<sup>70</sup> As stated above, for the widow to obtain, dollar-wise, the greatest economic benefits possible, the Florida dower statute must be amended so that the interest elected thereunder may qualify for the marital deduction. It is with this uppermost in mind that the following proposed statute is offered:

The guardian of a widow suffering under disabilities may, at any time during which the widow might have done so, file an election on behalf of the widow to take dower in lieu of the provisions of the will of her husband or under the law of descent and distribution. If a widow shall die prior to the expiration of the time allowed for the filing of her election to take dower in lieu of the provisions of the will of her husband or under the law of descent and distribution, and shall not have filed such election, the same may be filed at any time before the expiration of such period by any person who has a beneficial interest in the estate of such deceased widow. The timely right to elect dower shall be indefeasibly vested in the widow from the moment of her husband's death; and during her lifetime shall be unconditionally exercisable by the widow or her guardian and, upon her death, by any person beneficially interested in her estate.

#### VIII. CONCLUSION

Regretfully, much costly litigation is to be anticipated on the disallowance of the Florida dower interest from the federal estate tax marital deduction. Immediate corrective state legislation is urgently needed to qualify the interest. Since a retroactive deduction-saving amendment could not, for federal estate tax purposes, provide the interest with non-terminable characteristics as of the date of the husband's death,<sup>71</sup> the change should be made as soon as possible in order that maximum dower benefits may be obtained for future widows.

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70. This concern is manifested in FLA. STAT. § 731.34 (1965) which provides that dower shall be free from the debts of the husband and the expenses incurred in the administration of his estate.

71. See text accompanying note 28 *supra*.